



1 granted the motions of two defendants, MTC and Mortgage Electronic Registration System  
2 (“MERS”), to dismiss for failure to state a claim. The remaining two defendants, IndyMac  
3 and Homeplaceloans.com, have failed to plead or otherwise defend. The Clerk of the Court  
4 has entered default. (Doc. #60.)

5 Plaintiff moved for default judgment. After entry of default by the Clerk of the Court  
6 under Rule 55(a), the Court may then grant default judgment under Rule 55(b)(2). However,  
7 entry of default judgment is not a matter of right, but is entirely within the court’s sound  
8 discretion. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In *Eitel v. McCool*, 782  
9 F.2d 1470 (9th Cir. 1986), the Ninth Circuit enumerated seven factors that a court may  
10 consider in determining whether to grant default judgment.

11 On April 14, 2010, Plaintiff submitted an affidavit—making no reference to the *Eitel*  
12 factors—requesting declaratory relief on his TILA claims and requesting quiet title. The  
13 Court found that Plaintiff had not satisfied the *Eitel* factors, but permitted Plaintiff to file an  
14 amended motion for default judgment addressing these deficiencies. On May 21, 2010,  
15 Plaintiff filed the present motion.

## 16 **II. The Motion for Default Judgment**

17 Plaintiff requests that the Court exercise its discretion and enter default judgment  
18 against Defendants IndyMac and Homeplaceloans.com. In exercising this discretion, the  
19 Court is guided by a consideration of the following factors:

20 (1) the possibility of prejudice to the plaintiff, (2) the merits of plaintiff’s  
21 substantive claim, (3) the sufficiency of the complaint, (4) the sum of money  
22 at stake in the action; (5) the possibility of a dispute concerning material facts;  
23 (6) whether the default was due to excusable neglect, and (7) the strong policy  
underlying the Federal Rules of Civil Procedure favoring decisions on the  
merits.

24 *Eitel*, 782 F.2d at 1471-72. Because there are two separate substantive claims, the Court will  
25 first analyze the second factor—the merits of each of plaintiff’s substantive claims—and then  
26 move on to the remainder of the *Eitel* factors.

1           **A. Merits of Plaintiff's TILA Claims**

2           Plaintiff requests the Court enter declaratory judgment that Defendants IndyMac and  
3 Homeplaceloans.com committed violations of TILA, that Plaintiff exercised his statutory  
4 right of rescission to cancel the security agreement, and, thus, that Plaintiff's entire liability  
5 on the promissory note has been cancelled.

6           Plaintiff's rescission theory rests on a misreading of 15 U.S.C. § 1635. Section  
7 1635(a) creates the statutory right of rescission relied on by Plaintiff, as follows:

8           Except as otherwise provided in this section, in the case of any consumer  
9 credit transaction (including opening or increasing the credit limit for an open  
10 end credit plan) in which a security interest, including any such interest arising  
11 by operation of law, is or will be retained or acquired in any property which  
12 is used as the principal dwelling of the person to whom credit is extended, the  
13 obligor shall have the right to rescind the transaction until midnight of the third  
business day following the consummation of the transaction or the delivery of  
the information and rescission forms required under this section together with  
a statement containing the material disclosures required under this subchapter,  
whichever is later, by notifying the creditor, in accordance with regulations of  
the Board, of his intention to do so.

14          This right to rescind is subject to an express exception, however, in § 1635(e), which  
15 provides: "This section does not apply to—(1) a residential mortgage transaction as defined  
16 in section 1602(w) of this title...." Section 1602(w), in turn, defines a "residential mortgage  
17 transaction" as "a transaction in which a mortgage, deed of trust, purchase money security  
18 interest arising under an installment sales contract, or equivalent consensual security interest  
19 is created or retained against the consumer's dwelling to finance the acquisition or initial  
20 construction of such dwelling." Therefore, there is no statutory right of rescission under 15  
21 U.S.C. § 1535(e) where the loan at issue involves the creation of a first lien to finance the  
22 acquisition of a dwelling in which the customer resides or expects to reside. *See, e.g.,*  
23 *Betancourt v. Countrywide Home Loans, Inc.*, 344 F.Supp.2d 1253 (D. Colo. 2004).

24          Here, it is undisputed that the loan in question was to finance the acquisition of a  
25 property purchased for use as a primary residence. Consequently, the right of rescission  
26 created by 15 U.S.C. § 1635 is not applicable to this transaction. Therefore, the second *Eitel*  
27 factor weighs heavily against granting default judgment declaring Plaintiff's purported  
28 statutory rescission valid.

1           **B. Merits of Plaintiff’s Action for Quiet Title**

2           Plaintiff also requests the Court quiet title as to all defendants. However, Arizona law  
3 requires a complaint for an action to quiet title to include an allegation of title in plaintiff.  
4 The Court, in its previous order, found that Plaintiff’s status as a trustor is not such an  
5 allegation under Arizona law governing Deeds of Trust, A.R.S. § 33-801, *et seq.* (2007).  
6 (*See* May 14, 2010 Order.) Until Plaintiff pays off the loan, it is the trustee—not Plaintiff,  
7 the trustor—who holds the title in trust.

8           Plaintiff, in the amended motion, offers two reasons why the Court ought to allow it  
9 to bring an action to quiet title. First, Plaintiff argues that a quiet title action may be brought  
10 by a party holding any interest in the land even if the party has no claim of title. (Doc. #63  
11 at 4.) This construction of A.R.S. § 12-1101 (2007) is at odds with the established precedent  
12 of the Arizona Supreme Court; *Verde Water & Power Co. v. Salt River Valley Water Users’*  
13 *Ass’n*, 197 P. 227 (Ariz. 1921), explicitly provides “that a complaint to quiet title... [must]  
14 show title in the plaintiff...” *Id.* at 228. Plaintiff provides no legal authority suggesting that  
15 this precedent has been or ought to be overturned.

16           Secondly, Plaintiff argues that the TILA rescission discussed above invalidates the  
17 title that the trustee would otherwise hold. As the Court finds that this statutory right is not  
18 applicable in this case, the trustee’s title remains undisturbed.

19           As the Court made explicit in its earlier Order, quiet title is not a remedy available  
20 to a trustor under an Arizona Trust Deed until the debt is paid or tendered. Plaintiff has not  
21 paid the loan amount, nor has Plaintiff alleged that he is ready, willing and able to tender the  
22 full amount owed. Thus, Plaintiff’s purported use of the action to quiet title is inappropriate.  
23 Thus, for this claim also, the second *Eitel* factor weighs heavily against granting default  
24 judgment.

25           **C. Other *Eitel* factors**

26           The first *Eitel* factor weighs in favor of default judgment, as Plaintiff will be  
27 prejudiced because Plaintiff would be without other recourse for recovery against Defendants  
28

1 Indymac and Homeplaceloans.com. *Pepsico, Inc. v. Cal. Sec. Cans*, 238 F.Supp.2d 1172,  
2 1177 (C.D. Cal. 2002).

3 The third *Eitel* factor—the sufficiency of the complaint—weighs against default  
4 judgment. As discussed above, Plaintiff’s complaint is legally insufficient as to all claims.

5 The fourth *Eitel* factor weighs against default judgment. Under this factor, the Court  
6 considers the amount of money at stake in relation to the seriousness of defendants’ conduct.  
7 *Eitel*, 782 F.2d at 1471-72. In his motion for default judgment, Plaintiff states that he is  
8 seeking no damages or costs, but requests that his entire loan liability of more than \$300,000  
9 cancelled. The seriousness of defendants alleged violations is inconsistent with such a large  
10 award.

11 The fifth *Eitel* factor also weighs against default judgment. On entry of default, all  
12 well-pleaded facts in the complaint are taken as true, except those relating to damages.  
13 *TeleVideo Sys., Inc.*, 826 F.2d at 917-18. However, as discussed above, Plaintiff has not  
14 plead all material facts needed to support his claims (including failing to allege title in the  
15 plaintiff). Therefore, there is a possibility that a dispute may arise from a material fact not  
16 yet plead. Accordingly, the Court finds that the fifth factor weighs against default judgment.

17 The sixth *Eitel* factor weighs in favor of default judgment. Here, the possibility that  
18 default resulted from excusable neglect appears unlikely. Defendants Indymac and  
19 Homeplaceloans.com failed to answer the complaint or otherwise respond and neither  
20 defendant opposed Plaintiff’s motion for default judgment. Accordingly, this factor weighs  
21 in favor of granting default judgment.

22 The final factor—the strong policy underlying the Federal Rules of Civil Procedure  
23 favoring decisions on the merits—weighs against default judgment, as “cases should be  
24 decided upon their merits whenever reasonably possible.” *Eitel*, 782 F.2d at 1472.

25 Therefore, because factors two, three, four, five, and seven weigh against granting  
26 default judgment, the Court finds that Plaintiff is not entitled to default judgment against  
27 Defendants Indymac and Homeplaceloans.com.

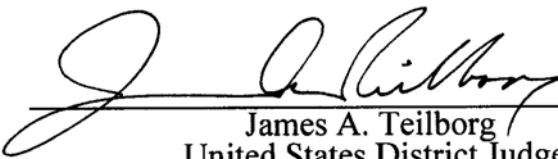
28 Accordingly,

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**IT IS ORDERED** denying Plaintiff's motion for default judgment (Doc. #63).

**IT IS FURTHER ORDERED** directing the Clerk to close the case.

DATED this 4<sup>th</sup> day of June, 2010.

  
James A. Teilborg  
United States District Judge